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MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States
OCTOBER TERM, 1977

NO. 77-1266

ERNEST N. MORIAL, LUKE FONTANA, CARL GALMON,
RUSSELL J. HENDERSON, and CHRISTINE B. VALTEAU,

Petitioners

versus

JUDICIARY COMMISSION OF THE STATE OF LOUISIANA,
CLEVELANT C. BURTON, JAMES H. DRURY, SIDNEY B. FLYNN,
JUDGE EARL E. VERON, CHARLES H. HECK, JUDGE PAUL B.
LANDRY, JR., JUDGE S. SANFORD LEVY, EDWARD W. STAGG, as
members of the Judiciary Commission of the State of Louisiana; JOE
SANDERS, FRANK W. SUMMERS, ALBERT TATE, JR., JOHN A.
DIXON, JR., WALTER F. MARCUS, PASCAL CALOGERO, JAMES
L. DENNIS, as Justices of the Supreme Court of Louisiana; EDWIN
EDWARDS, in his capacity as Governor, State of Louisiana; WILLIAM
J. GUSTE, JR., in his capacity as Attorney General, State of Louisiana;
PAUL J. HARDY, in his capacity as Secretary of State, State of
Louisiana,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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VERSUS

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

Ernest N. Morial prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on December 13,

1977 reversing the judgment of the United States District Court for the Eastern District of Louisiana entered February 8, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals is officially reported as *Morial v. Judiciary Commission of the State of Louisiana*, 565 F.2d 295 (5th Cir. 1977). The opinion of the District Court is reported as *Morial v. Judiciary Commission of the State of Louisiana*, 438 F.Supp. 599 (E.D. La. 1977).

JURISDICTION

The judgment of the Court of Appeals was entered December 13, 1977. This Court has jurisdiction to review the judgment by Writ of Certiorari under 28 USC § 1254(1).

QUESTION PRESENTED

Whether a Louisiana statute and canon of judicial conduct requiring elected judges to resign their position before announcing their candidacy for judicial office are violative of petitioner's First Amendment and Fourteenth Amendment Equal Protection rights.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED:

UNITED STATES CONSTITUTION

Amendment I.

"Congress shall make no law... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Amendment XIV, section I.

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES AND CANONS OF JUDICIAL CONDUCT

La R. S. 42:39

"A. After July 31, 1968, no person serving in or elected or appointed to the office of judge of any court, justices of the peace excepted, shall be eligible to hold or become a candidate for any national, state or local office in any political party organization, other than a candidate for the office of judge for the same or any other court."

"B. The provisions of Subsection (A) of this section shall not be construed as prohibiting any person from resigning from his office as judge of any court for the purpose of becoming a candidate for nomination or election to any national, state or local elective office for which he is qualified and eligible, provided, however, that the resignation of any such person shall be and is made not less than twenty-four hours prior to the date on which he

qualifies a mere candidate for nomination or election to the office to which he seeks nomination or election."

"C. If any judge elected or appointed, justice of the peace excepted, qualifies for any other elective position, other than those allowed by the provisions of this section, without complying with the provisions of Section (B) set forth above, his qualification as a candidate for the other office shall ipso facto be null and void."

Canon 7 (A) (3) of the Louisiana Code of Judicial Conduct:

"A judge should resign his office when he becomes a candidate either in a party primary or in a general election for a non-judicial office, except that he may continue to hold his judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention, if he is otherwise permitted by law to do so."

STATEMENT OF THE CASE

In December, 1976 when suit was filed in the District Court, petitioner Ernest Morial was a judge of the Court of Appeals, Fourth Circuit, State of Louisiana. Judge Morial was interested in becoming a non-party candidate for the office of Mayor of New Orleans to which he was subsequently elected on November 12, 1977. By letter of October 16, 1976, he requested that the Supreme Court of Louisiana grant him a leave of absence, without pay from his judicial duties in order that he might become a candidate for the

office of Mayor. The Supreme Court of Louisiana unanimously denied Morial's request for a leave of absence in view of Canon 7 (A) (3) of the Louisiana Code of Judicial Conduct. Morial was advised by the court's Committee on Judicial Ethics that he would be required to resign his office before announcing his candidacy.

Morial, joined by thirteen citizen-voters who indicated their support for his candidacy, brought suit in Federal District Court seeking a declaration that La. R. S. 42:39 and Canon 7 (A) (3) are unconstitutional and sought to enjoin enforcement of those laws. Named as defendant were the Judiciary Commission of the State of Louisiana, its members, the Louisiana Supreme Court, and its members, the Governor, Attorney General and Secretary of State of Louisiana.

On February 8, 1977, Judge Fred Cassibry of the United States District Court for the Eastern District of Louisiana rendered judgment for petitioners, declaring La. R. S. 42:39 and Canon 7 (A) (3) unconstitutional and further restraining and enjoining certain state officials from enforcing the challenged provisions. The judge based his decision of unconstitutionality on the First and Fourteenth Amendments.

Defendants appealed to the Court of Appeals for the Fifth Circuit and the appeal was assigned to a three judge panel in February, 1977. Oral argument in the matter was heard by the three judge panel in June, 1977 after briefs had been submitted.

On November 3, 1977, the Fifth Circuit transferred the appeal from the three judge panel to the court en banc and

stayed the decision of the district court. Immediately thereafter, Morial resigned his judgeship and subsequently was elected to the office of Mayor.

REASONS FOR GRANTING THE WRIT

I. This case presents a constitutional question of great importance that has been expressly reserved by this Court.

This case presents an issue which has never been decided by the Court and which is of great interest to many in and outside of judiciary. The majority opinion of the Court of Appeals for the Fifth Circuit noted at 565 F.2d 306 that "the questions presented here are difficult ones". The lone dissent written by Judge Fay remarks at 565 F. 2d 308 that, "[s]eldom has this court been presented with issues more complex and important than the ones before us today."

The core issue which calls for the resolution of a real or apparent conflict between two great concerns, free speech and judicial impartiality, entails the resolution of many subsidiary questions of first impression and of major concern to potential litigants. These issues are: (1) the status of the constitutional protection afforded the right to candidacy.

- (2) The state's permissible interest in the regulation of the speech of its judges.
- (3) The state's permissible interest in the regulation of free speech of elected officials who happen to be judges.

These issues give rise to subsidiary questions which will

be addressed in the event that a writ of certiorari is granted.

The Fifth Circuit's resolution of these issues will not stem the litigation which is sure to arise in other jurisdictions and only the Court can set this matter to rest.

The pleadings and evidence adduced at trial have sharpened the constitutional issues which are now ripe for the Court's resolution. The questions should be settled by this Court.

II. These important questions were wrongly decided by the Court below.

The Court should grant this writ if for no other reason than that the Fifth Circuit has incorrectly stated the standard of First Amendment analysis with respect to the right to candidacy.

In its opinion the Fifth Circuit articulated a means-end analytical mode, the standard of which varies with the category of speech involved. In instant case the Court below relegated Morial's first amendment concerns to a reasonable-necessary test. Thus, the Fifth Circuit resolved this issue by asking itself whether Louisiana's resign-to-run requirement was reasonably necessary to achieving the state's aim to assure judicial impartiality.

However, a synthesis of the Court's recent holdings in First Amendment cases indicates a different analytical mode and standard which was not employed by the Fifth Circuit in the resolution of the issues.

The Court in *United States v. O'Brien*, 391 US 367

(1968) and *Brandenburg v. Ohio*, 395 US 444 (1969) and their progenies, has articulated a standard which requires the threshold inquiry of whether the communicative significance of the regulated activity is relevant to the state interest underlying the regulation. In other words, is the state interest threatened only because the regulated activity expresses some message, or is it plausible to conclude that the interest would be equally threatened if the activity communicated nothing at all. See, Ely, *Flag Desecration; A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482 (1975) and Comment, *Political Boycott Activity and the First Amendment*, 91 Harv. L. Rev. 659, 672 (1978).

Where the expressive aspect of the regulated activity is only incidental to the state's objectives, then the Court may consider whether "the incidental restriction on alleged First Amendment freedoms is no greater than essential to the furtherance of that interest". 391 US at 377.

Where, however, the government's interest in regulating the activity is directly threatened by the communicative aspects of the activity, then the speech is absolutely protected from regulation unless it falls within several judicially created categories of unprotected speech, such as:

- (1) Speech directed to invite or produce imminent lawless action
- (2) Commercial speech
- (3) Libel
- (4) Obscenity and

(5) Fighting words.

In instant case the resign to run laws are particularly directed at judges because of the State's fear that judges who are candidates for nonjudicial office will say things that will cast doubts on their impartiality with respect to public issues which they may be called upon to resolve. Thus, the resign to run laws are intended to arrest any notion of the public that judges have strong opinions on public issues which may influence their judicial decisions both during the campaign and after conducting a losing effort.

Thus, the challenged state laws are impermissible particularly in view of the fact that in Louisiana judges are elected to their offices and allowed to run for judicial offices without resigning their offices and the resign to run requirements are not applicable to other elected officials.

Moreover, even under the standard enunciated by the Fifth Circuit the decision is incorrect. The findings of facts of the trial judge uncontested on appeal by the defendants establish beyond peradventure that in Louisiana candidacies for judicial office are in every respect similar to candidacies for non-judicial office, the canons of judicial conduct notwithstanding, Judges running for re-election or election to a higher office in Louisiana must undergo the same political pressures as candidates for non-judicial office as spelled out in the district court's opinion.

If the political process compromises judicial integrity, actual or perceived, and judges presently engage in that process in Louisiana, how then may the state resurrect judicial integrity by denying judges the right to be candidates for

nonjudicial offices?

The first Amendment concern is also cast in an equal protection framework as the above discussion indicates.

The Fifth Circuit has in effect wrongfully overturned the lower court's findings of fact to reach a result which it considers to be in the mainstream of thought about the judiciary.

CONCLUSION

For the reasons stated, the Petition for Certiorari should be granted.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to the Rules of this Court, three copies of the Original Brief of the Appellants have been served upon counsel of record for Appellees, Truman Woodward, Jur., 1100 Whitney Building, New Orleans, Louisiana 70130, by posting same, properly addressed, and postage prepaid, in the United States mail, this 10th day of March, 1978.

Counsel for Appellants